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7 Attorneys for the United States of America

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR1184-WQH
	)	
11 Plaintiff,	)	DATE: May 19, 2008
	)	TIME: 2:00 p.m.
12 v.	)	
	)	
13 ESTEBAN ARELLANOS-ROJAS,	)	
	)	
14	)	GOVERNMENT'S RESPONSE AND
	)	OPPOSITION TO DEFENDANT'S
15	)	MOTIONS:
	)	
16 Defendant.	)	(1) TO COMPEL DISCOVERY
	)	(2) FOR LEAVE TO FILE FURTHER
17	)	MOTIONS
	)	
18	)	TOGETHER WITH STATEMENT OF FACTS,
	)	MEMORANDUM OF POINTS AND
19	)	AUTHORITIES AND GOVERNMENT'S
	)	MOTIONS FOR RECIPROCAL DISCOVERY
20	)	AND FINGERPRINT EXEMPLARS

21 The United States of America, by its counsel, Karen P. Hewitt,  
22 United States Attorney, and Paul S. Cook, Assistant United States  
23 Attorney, hereby responds to and opposes Defendants' above-captioned  
24 Motions. This response and opposition is based upon the files and  
25 records of the case, together with the attached statement of facts and  
26 memorandum of points and authorities. The Government also hereby  
27 files its motion for reciprocal discovery and fingerprint exemplars.  
28

I  
STATEMENT OF FACTS

On Saturday, March 15, 2008, Defendant was arrested, for being under the influence of heroin, by an Imperial County Deputy Sheriff at the intersection of Heber Road and Highway 86 in Heber, California. Defendant was booked into the Imperial County Jail and immigration authorities were notified.

An Immigration Enforcement Agent reviewed records and determined that the Defendant was a Mexican citizen with no legal permission to be in the United States and had been ordered removed from the United States by an Immigration Judge on May 15, 2001. This Order of Removal had subsequently been reinstated six times when the Defendant was found in this country. The most recent removal was February 6, 2004. The Defendant has a December 2000 conviction for First-degree Residential Burglary.

On March 19, 2008, Defendant was turned over to ICE agents, and taken to the Imperial, California ICE office. He was advised of his Miranda rights, signed a waiver of his rights, and voluntarily agreed to speak to agents without an attorney present. Defendant stated that he is a Mexican citizen, born in Mexicali, Mexico. He stated that he had no legal status to be in the United States and had last crossed the international border by walking through the mountains. He acknowledged that he was previously removed from the United States and had not applied for permission to re-enter the country. Although he knew it was illegal to re-enter the country, he was going to be with his daughter.

1 Defendant was also advised of his right to speak to a Mexican  
2 Consular official, and declined to exercise that right.

3 II  
4 **THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH**  
5 **ITS DISCOVERY OBLIGATIONS**

6 The United States is aware of its discovery obligations, and will  
7 continue to comply with its obligations under Brady v. Maryland, 373  
8 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the  
9 Federal Rules of Criminal Procedure. and will continue to comply with  
10 all discovery rules. The United States has provided Defendants with  
11 70 pages of discovery including: the arrest reports, the Defendant's  
12 criminal history; a CD of Defendant's interview; and immigration  
13 documents relevant to his deportations. Regarding some of the  
14 specific requests made by the Defendant which are not covered by the  
15 above acknowledgment, the United States responds as follows:

16 1. Rule 404(b) Evidence

17 The United States hereby provides Defendant with notice of its  
18 intent to present evidence pursuant to Rule 404(b). The Government  
19 intends to use one or more of the Defendant's six prior apprehensions  
20 for Illegal Entry or Deported Alien found in the United States (as  
21 mentioned above), and any statements he made regarding his citizenship  
22 and right to be in the United States. The Government will provide  
23 arrest reports and other court documents relevant to Defendant's prior  
24 arrests.

25 2. Evidence Seized and Tangible Objects

26 No items of evidentiary value were seized from the Defendant.  
27 The Government will provide copies of or an opportunity to inspect all  
28

1 documents, and tangible things material to the defense, intended for  
2 use in the Government's case in chief.

3 3. Criminal Investigation of Any Government Witnesses

4 The Government is unaware of any criminal involvement by any  
5 prospective government witness, or that any witness is under  
6 investigation. Although the Government will provide conviction  
7 records, if any, which could be used to impeach a witness, the  
8 Government is under no obligation to turn over the criminal records  
9 of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th  
10 Cir. 1976). When disclosure need only extend to witnesses the  
11 Government intends to call in its case-in-chief. United States v.  
12 Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini,  
13 607 F.2d 1305, 1309 (9th Cir. 1979).

14 The Government will turn over evidence within its possession  
15 which could be used to properly impeach a witness who has been called  
16 to testify. Defendant is not entitled, however, to any and all  
17 evidence that a prospective witness is under investigation by federal,  
18 state or local authorities for misconduct.

19 4. Bias, Motive to Lie and Impeachment Evidence Of Prospective  
20 Witnesses

21 The Government is unaware that any information demonstrating that  
22 a witness is biased against Defendant or has a motive to lie. As  
23 noted above, the Government will comply with its obligations under  
24 Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,  
405 U.S. 150 (1972).

1           5.     Evidence Affecting Perception, Recollection,  
2                 Ability to Communicate, or Truth Telling

3           The Government is unaware of any witness with perception,  
4           recollection, communication, or veracity problems.

5           6.     List and Addresses of Witnesses

6           The Government has provided Defendant with the investigative  
7           reports relating to this crime. These reports include the names of  
8           the law enforcement personnel, eye witnesses and other people  
9           interviewed as part of the follow-up investigation. The Government  
10          will provide Defendant with a list of all witnesses which it intends  
11          to call in its case-in-chief at the time the Government's trial  
12          memorandum is filed, although delivery of such list is not required.  
13          See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United  
14          States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v.  
15          Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not  
16          entitled to the production of addresses or phone numbers of possible  
17          Government witnesses. See United States v. Hicks, 103 F.3d 837, 841  
18          (9th Cir. 1996) ("A district court that orders the Government and the  
19          defendant to exchange witness lists and summaries of anticipated  
20          witness testimony in advance of trial has exceeded its authority under  
21          Rule 16 of the Federal Rules of Criminal Procedure and has committed  
22          error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

23          Federal Rule of Criminal Procedure 16 does not require the  
24          government (or the defense) to disclose the names and addresses of  
25          witnesses pretrial. Indeed, the Advisory Committee Notes reflect that  
26          the Committee rejected a proposal that would have required the parties  
27  
28

1 to exchange the names and addresses of their witnesses three days  
2 before trial:

3 The House version of the bill provides that each party, the  
4 government and the defendant, may discover the names and  
5 addresses of the other party's witnesses 3 days before  
6 trial. The Senate version of the bill eliminates these  
7 provisions, thereby making the names and addresses of a  
8 party's witnesses nondiscoverable. The Senate version also  
9 makes a conforming change in Rule 16(d)(1). The Conference  
10 adopts the Senate version.

11 A majority of the Conferees believe it is not in the  
12 interest of the effective administration of criminal  
13 justice to require that the government or the defendant be  
14 forced to reveal the names and addresses of its witnesses  
15 before trial. Discouragement of witnesses and improper  
16 contact directed at influencing their testimony, were  
17 deemed paramount concerns in the formulation of this  
18 policy.

19 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)  
20 (quoting Rule 16 advisory committee notes) (emphasis added).

21 The Government will not disclose the names of witnesses it will not  
22 call at trial.

23 7. Expert Witnesses

24 The Government will timely notify Defendant of its expert  
25 witnesses, such as a fingerprint expert, and will comply with Fed. R.  
26 Crim. P. 16(a)(1)(G).

27 8. Personnel Records, Henthorn and Giglio Evidence

28 The United States will comply with United States v. Henthorn, 931  
F.2d 29 (9th Cir. 1991) by requesting that all federal agencies  
involved in the criminal investigation and prosecution review the  
personnel files of the federal law enforcement inspectors, officers,  
and special agents whom the United States intends to call at trial and  
disclose information favorable to the defense that meets the  
appropriate standard of materiality. See United States v. Booth, 309

1 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960  
2 F.2d 1488, 1489 (9th Cir. 1992)). If the materiality of incriminating  
3 information in the personnel files is in doubt, the information will  
4 be submitted to the Court for an in camera inspection and review.

5 Defendant's request that the specific prosecutor in this case  
6 review the personnel files is unwarranted and unnecessary. Henthorn  
7 expressly provides that it is the "government," not the prosecutor,  
8 which must review the personnel files. Henthorn, 931 F.2d at 30- 31.  
9 Accordingly, the United States will utilize its typical practice for  
10 review of these files, which involves requesting designated  
11 representatives of the relevant agencies to conduct the reviews. The  
12 United States opposes the request for an order that the prosecutor  
13 personally review the personnel files.

14 Defendant has not cited any Federal authority that requires the  
15 United States to produce complaints or internal affairs documents.  
16 The Pitchess case is inapplicable in federal court, and the United  
17 States will be controlled by the obligations imposed by Henthorn.  
18 Moreover, Pitchess v. Superior Court, 11 Cal.3d 531, 539 (1974) has  
19 been superceded by statute. See Fagan v. Superior Court, 111 Cal.  
20 App.4th 607 (2003). Pitchess involved a criminal case in which a  
21 defendant who claimed to have acted in self-defense sought evidence  
22 as to the police officers' use of force on previous occasions.  
23 Pitchess, 11 Cal. 3d at 534, 535. Pitchess is simply inapplicable to  
24 Defendant's case.

25 The United States will comply with its obligations to disclose  
26 impeachment evidence, if any, under Giglio v. United States, 405 U.S.  
27 150 (1972).

1           9.    A-File and Deportation Tape

2           The United States objects to Defendant's request to inspect the  
3 entire Alien Registration File ("A-File") associated with Defendant,  
4 since the A-File is not Rule 16 discoverable information. The  
5 Government has produced and will continue to produce relevant  
6 immigration documents from the Defendant's A-File. However, the A-  
7 File also contains information that is not discoverable, such as  
8 internal government documents and witness statements. (See Fed. R.  
9 Crim. P. 16(a)(2)). The United States will produce documents it  
10 intends to use in its case-in-chief. A fishing expedition through the  
11 A-file is not warranted. Evidence is material under Brady only if  
12 there is a reasonable probability that had it been disclosed to the  
13 defense, the result of the proceeding would have been different. See  
14 United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001).  
15 Defendant has not specified which documents in the A-File are  
16 material, and to which he is entitled.

17   **III**

18   **LEAVE TO FILE FURTHER MOTIONS**

19           The Government has no objection to this motion.

20   **IV**

21   **THE GOVERNMENT'S MOTION FOR RECIPROCAL**  
22   **DISCOVERY SHOULD BE GRANTED**

23           The discovery provided to Defendants, at their request, includes  
24 documents and objects which are discoverable under Rule 16(a)(1)(E).  
25 Consequently, the Government is entitled to discover from the  
26 defendant any books, papers, documents, data, photographs, tangible  
27 objects, buildings or places, or copies or portions of any of these  
28 items that are in Defendant's possession, custody or control and which



1 Defendant intends to use in the Defendant's case-in-chief. See Rule  
2 16(b)(1)(A), Fed. R. Crim. P..

3 Fed. R. Crim. P. 26.2 requires the production of prior statements  
4 of all witnesses, except Defendants'. The new rule thus provides for  
5 the reciprocal production of Jencks statements. The time frame  
6 established by the rule requires the statement to be provided after  
7 the witness has testified, as in the Jencks Act. Therefore, the  
8 United States hereby requests that Defendants be ordered to supply all  
9 prior statements of defense witnesses by a reasonable date before  
10 trial to be set by the Court. This order should include any form  
11 these statements are memorialized in, including but not limited to,  
12 tape recordings, handwritten or typed notes or reports.

13 **V**  
14 **MOTION FOR FINGERPRINT EXEMPLARS**

15 The United States requests that the Court order that Defendant  
16 make himself available for fingerprinting by the United States'  
17 fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d  
18 567, 576-77 (9<sup>th</sup> Cir. 2005) (Government may have defendant  
19 fingerprinted and use criminal and immigration records in Section 1326  
20 prosecution). Defendant's fingerprints are not testimonial evidence.  
21 See Schmerber v. California, 384 U.S. 757 (1966). Using identifying  
22 physical characteristics, such as fingerprints, does not violate  
23 Defendant's Fifth Amendment right against self-incrimination. United  
24 States v. DePalma, 414 F.2d 394, 397 (9<sup>th</sup> Cir. 1969); see also United  
25 States v. St. Onge, 676 F. Supp. 1041, 1043 (D. Mont. 1987).

VI  
CONCLUSION

For the above stated reasons, the Government respectfully requests that the Defendant's motions be denied, except where unopposed, and the Government's motion for reciprocal discovery and fingerprint exemplars be granted.

Date: May 12, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

s/Paul S. Cook  
PAUL S. COOK  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 08cr1184-WQH  
)  
Plaintiff, )  
)  
v. )  
) CERTIFICATE OF SERVICE  
ESTEBAN ARELLANOS-ROJAS, )  
)  
Defendant. )  
\_\_\_\_\_ )

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Julie A. Blair

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2008.

s/Paul S. Cook

PAUL S. COOK